Petition

81-1046

NO. _____

Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LOUIS H. GOMEZ, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MC PHERSON
Attorney for Petitioner
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130
Telephone: [504] 581-1973

THE ISSUES PRESENTED

1. Whether error occurred and whether the Court below so far departed from the ordinary course of judicial proceedings as to require the exercise by this Court of its power of supervision over the lower Federal Courts when it affirmed without opinion the judgment obtained against petitioner in a trial at which the petitioner was denied the opportunity to cross-examine police officers about extrinsic wrongful conduct, occurring during the course of their investigation of this and companion cases, which would have permitted the jury to put these officers in their correct perspective and would have removed them from whatever positions of esteem and resultant credibility the jury might generally have held for other police officers; when the Court refused a jury view of the scene to resolve a crucial conflict between the testimony of an FBI

Agent and an architect hired by the defense to make scale drawings and to testify about experiments conducted by him which would have affected the Agent's credibility; and further when the petitioner had been denied the opportunity to recall a witness for the purpose of cross-examining her upon newly discovered information about her addiction during the times relevant to her testimony or in the alternative to produce witnesses who were prepared to testify and prove that the said witness was a narcotic addict using drugs during the relevant times, which fact would have cast doubt upon the said witness' ability to perceive, recall and report what she testified she saw and heard during the time about which she testified against petitioner.

2. Whether error occurred and whether the Court below so far departed from the ordinary course of judicial proceedings as to require the exercise by this Court of its power of supervision over the lower Federal courts when it affirmed without opinion the judgment obtained against petitioner after a theory of defense instruction, consistent with the requirements of this Court's decision in Bronston v. United States, 409 U.S. 352 (1973), was refused by the Trial Court.

3. Whether Fifth Circuit Local Rule 21 was misapplied in this case and, if not, whether Local Rule 21 is consistent with Rule 47, F.R.A.P., and due process of law required to be accorded by the Fifth Amendment to the United States Constitution if it can reasonably be construed to permit the Court below to

affirm the judgment of the Trial Court without providing an opinion supporting its judgment when the judgment was erroneous and the distinction of this case from prior controlling precedent of the Fifth Circuit and of this Court would have had precedential value, both of which factors would thus have negated the application of Local Rule 21 in this case.

I N D E X

THE ISSUES PRESENTED 1

TABLE OF AUTHORITIES CITED v

PETITION:

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

REASONS FOR ALLOWING THE WRIT 28

CONCLUSION 69

CERTIFICATE OF SERVICE 70

Table of Authorities Cited

CASES:

Alford v. United States, 282 U.S. 687
27, 44, 50, 51, 65

Bronston v. United States, 409 U.S. 352
12, 13, 33, 34, 35, 36, 39, 40, 41, 42, 65

C.I.T. Corp. v. United States, 150 F.2d 85
52

Hug v. United States, 329 F.2d 475 48

Hughes v. United States, 377 F.2d 515 52

Government of Virgin Islands v. Taylor, 375 F.2d 771 52

Kitchen v. United States, 95 U.S.App. D.C. 277, 221 F.2d 832 48

Louis Hung v. United States,
111 F.2d 325 58

Massenberg v. United States,
19 F.2d 62 52

Pullman Co. v. Hall, 55 F.2d 139 49

Reid v. United States, 276 Fed. 253 52

Schonfeld v. United States,
277 F.2d 934 52

Seymour v. United States,
77 F.2d 577 41

Smith v. Illinois, 390 U.S. 129
45, 50, 51, 65

United States v. Alberti, 568 F.2d 617
38

United States v. Bryant, 563 F.2d 1227 52

United States v. Cash, 522 F.2d 1025 40

United States v. Colacurcio, --- F.2d ---,
5 Cir. Slip Op. p. 12529 (10/22/81)
28

United States v. Cook, 497 F.2d 753 40

United States v. Kehoe, 562 F.2d 65 39

United States v. Lattimore, 127 F.Supp.
405, aff'd 98 U.S.App.D.C. 77,
232 F.2d 334 41

United States v. Leonard, 524 F.2d 1076
37

United States v. Lopez, 475 F.2d 537 52

United States v. Partin, 493 F.2d 750
27, 60, 66

United States v. Varelli, 407 F.2d 735 48

United States v. Wall, 371 F.2d 398 41

United States v. Winter, 348 F.2d 204 41

CONSTITUTION, STATUTES AND RULES:

UNITED STATES CONSTITUTION:

5th Amendment 4, 63

6th Amendment 50, 62

UNITED STATES CODE:

18 U.S.C. §1041 46

18 U.S.C. §1623 3, 4

18 U.S.C. §3231 3

28 U.S.C. §1254(1) 3

28 U.S.C. §2094 59

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 47, F.R.A.P. 5

5th Cir. Local Rule 21 5, 6, 26, 63, 64

FEDERAL RULES OF EVIDENCE:

Rule 608(b), F.R.Evid. 50, 59

MISCELLANEOUS AUTHORITIES CITED:

23 C.J.S. Criminal Law §986 52

3 Weinstein's Evidence ¶607[04], p. 607-46 58, 59

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LOUIS H. GOMEZ, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Louis H. Gomez, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Fifth Circuit, rendered in this proceeding on April 27, 1981.

OPINIONS BELOW

The Court of Appeals, ostensibly under the authority of Fifth Circuit Local Rule 21, did not write an opinion in this case but merely affirmed the judgment of the District Court without an opinion. The judgment affirming without opinion the said judgment of the Trial Court is unreported. It is reproduced herein at Appendix A, post, p. A-1.

There was no formal opinion accompanying the order denying the petition for rehearing and suggestion for rehearing en banc. A copy of the Order denying rehearing and refusing a rehearing en banc is reproduced herein in Appendix B, post, p. A-2.

There were no relevant written opinions of the District Court.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, post, p. A-1) was rendered on April 27, 1981. It became final upon the denial by the Court below of a timely filed petition for rehearing and suggestion for rehearing en banc on July 21, 1981.

This case originated in the United States District Court for the Eastern District of Louisiana upon an indictment charging petitioner with perjury before a grand jury, a violation of 18 U.S.C. §1623. The District Court had jurisdiction of this case pursuant to 18 U.S.C. §3231.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States in pertinent part provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining Witnesses in his favor * * *.

The statute describing the offense with which the petitioner is charged, 18 U.S.C. §1623, reads in pertinent part as follows:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States

knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 47, Federal Rules of Appellate Procedure, provides:

> Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Local Rule 21, Fifth Circuit Rules, provides:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; **and** the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or

order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21." or "ENFORCED. See Local Rule 21."

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

STATEMENT OF THE CASE

This is a criminal case in which the petitioner was accused of committing perjury before a grand jury when he denied knowledge, inter alia, that prostitution activities were occurring on the "second floor" of a building owned by him in the French Quarter of New Orleans.

A. THE JURY INSTRUCTION ISSUE.

Petitioner's building, located at 121-123 Decatur Street, was renovated on its first floor by a tenant, Paulino Lopez. When petitioner purchased the building, the Act of Sale described the building as a two-story structure. At that time, the former tenant of the first floor--a dry

goods merchant--had erected a small loft or mezzanine area for storage of merchandise. When Mr. Lopez renovated the first floor of the building, he moved the stairs leading to the loft area and erected a wall which concealed the stairs and placed rooms in the loft area which were originally intended to quarter transients, merchant seamen, etc. We submit that it was at the instruction of the police posing as corrupt policemen that Paulino subsequently used those rooms for prostitution. Whether the persons subsequently arrested and charged with RICO violations (petitioner was not one of them) were the victims of entrapment is not relevant to this petition, however the conduct of the officers during their "investigation," we submit, was relevant to the issue of their credibility when, by their testimony, they imputed to petitioner acts indicative of

his knowledge that prostitution was occurring upon his property.

During the grand jury testimony of petitioner, he testified and the Government alleges that the underscored portion of such testimony was false, as follows:

> Q. During the time you were there, did you observe any women going to the second floor with a man and paying Mr. Lopez $5 to have him let them in the entrance?
>
> A. While I was there, I saw a lot of people passing money. I saw women who looked very cheap in the place who were obviously prostitutes. At no time could I tell you that I saw someone pass $5 to go upstairs, and certainly not to the second floor. The second floor is an empty ballroom. I hope you all have gone to look at the building. (Grand Jury Transcript, Government Exhibit G-3, p. 12)
>
> * * * * * * *
>
> Q. On that occasion, did you notice or did you see women going upstairs with men after giving something to Mr. Lopez?
>
> A. No.
>
> Q. You've never seen that, have you?
>
> A. I have never seen anyone go upstairs. I have never been upstairs, and I have never seen anyone go upstairs. I have never seen any steps leading from

the downstairs to the upstairs. The second floor steps, you go out of the building and go out to the second floor. (G-3, pp. 54-55.)

* * * * * * *

A JUROR: Mr. Gomez, to get upstairs, you said you had to go outside to go upstairs. They didn't have no--

THE WITNESS: For what I thought was the upstairs, yes, sir. There's two stories to the building. 121 is a stairwell going up the steps to the second floor, and 123 to Los Amantes Bar. Now, I have never been upstairs, you know, six or seven times, but that is the Greek ballroom that the guy went broke in. It's still there, sitting with the bar and sitting with the stage. When they refer to the upstairs, there was a little mezzanine type thing in the Los Amantes Bar. Okay, that's where they are referring to. I have never been in there and really didn't see it, until today. I have asked where it was and how did you get there, and I plan to go visit it. Originally, there had been a partial loft to store goods for the dry goods store so that when the ceiling was lowered for air-conditioning for the lounge and everything else, you know, to design the lounge, the loft was left there. From my understanding, that is where the cubicles or the rooms are. I have never seen them, until today. I plan to go look at them. I did not want to go do that until I came here, because I received a subpoena. I have never seen those rooms. (G-3, pp. 70-73)

* * * * * * *

A JUROR: You bought that building and you mean to tell the Grand Jury and the men over here that you never inspected it? You don't know what's upstairs?

THE WITNESS: Oh, no, sir. Let me try and explain that to you. It was a two-story building, and I went through the whole building. I didn't mean to imply that to you and I'm sorry you got that impression.

A JUROR: That's what you just said.

THE WITNESS: No, sir. There was a hidden stairway into a little loft that I was not aware of. It did not appear to me and still does not appear to me--if you all go by there--that there is enough room, but I am told that there is. When you walk into the bar, the bar is obviously the first floor and you will not see a loft. You will not see anything. It happens that the ceilings have been lowered. If you go outside, there is a stairwell going upstairs which is the deserted Greek nightclub that was built. It is a big ballroom, and couldn't possibly be used for prostitution unless it was open. It's a room bigger than this.

A JUROR: There's no way from the inside of that building on the first floor that you have to go upstairs?

THE WITNESS: That's right, but that's the area that these men have in question. When they say the room upstairs, they are questioning a hidden mezzanine between the two floors. If you look at these documents here, you will find a two-story building. There was a mezzanine between the two floors,

> and that's what they refer to as upstairs. The upstairs is still a big ballroom. (G-3, pp. 73-75.)

There were other areas of inquiry in which petitioner's answers were alleged to have been false, e.g., whether petitioner saw money exchanged for the privilege of using rooms "upstairs" or on the "second floor" to conduct prostitution; whether petitioner knew the rooms were being used to conduct prostitution; whether he had seen steps leading to the area where prostitution was occurring; etc.

Because the indictment charged all allegedly false answers in a single count of the indictment rather than alternatively charging such answers by group so a verdict would demonstrate what testimony the verdict determined to be false, defense counsel believed that the controversy regarding petitioner's distinction between "upstairs" and "second floor" and the Government's interchangeable use of those

terms required the Court to instruct the jury in accordance with this Court's opinion in Bronston v. United States, 409 U.S. 352 (1973). Defendant's Requested Jury Instruction No. 9 requested that the Court instruct the jury (R. 230):

> If a question is reasonably susceptible of two different interpretations, a response is not a false declaration unless it is shown beyond a reasonable doubt to be false under both possible interpretations of the question. Precise questioning is required to support a charge of false declarations.
>
> The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

The Trial Court actually charged the jury (R. 244):

> In reviewing the testimony which is alleged to have been false, you should consider such testimony in the context of the sequence of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.
>
> If you should find that a particular question was ambiguous and that the defendant truthfully answered one reasonable interpretation of the question

under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear but the answer was ambiguous, and one reasonable interpretation of such answer would be truthful, then such answer would not be false.

By requiring that the meaning of "upstairs" and "second floor" be mutually understood by the questioner and the witness, as the Court's instructions to the jury did, petitioner was denied the defense available under this Court's teaching in Bronston that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner--so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Bronston," 409 U.S. at 360. The petitioner frequently defined for the grand jury what he meant by the "upstairs" and the "second floor" and constantly re-

fused to adopt the prosecutor's characterization of the mezzanine area as either. Under the definition given to the grand jury by petitioner, his answers were literally true.

B. THE CONFRONTATION ISSUES.

This case arises out of an investigation in the French Quarter of New Orleans of bribery of police officers. Three officers of the New Orleans Police Department (N.O.P.D.) and one Special Agent of the Federal Bureau of Investigation (F.B.I.), acting in an undercover capacity, held themselves out as corrupt N.O.P.D. officers and made it known that they were open to being bribed to permit the conduct of prostitution and gambling in the French Quarter.

Two cases arising out of that investigation were tried before this case went to trial. The Judge(s) in those cases permitted extensive cross-examination of the po-

lice officers about their individual conduct in the course of the investigation, which cross-examination delved into specific instances of official misconduct or lawlessness preceding and contemporaneous with the undercover operation in this case, known criminal associates and associations by one of the officers (Kastner), official disciplinary action taken against another of the N.O.P.D. officers (Tank) for misconduct occurring during the undercover operation out of which the instant case stems, etc. Officer Brink, also involved in the investigation leading to the charges herein, did not testify and his conduct was appropriately excluded in the motion in limine proceedings conducted with regard to this case. The Government was aware that counsel for petitioner monitored the trials of the other two connected cases. It filed a motion in limine

to prevent the cross-examination of the police officers as extensively in this case as they had been cross-examined in the other two cases. Petitioner objected to the Government's position and filed a document setting forth precisely what it intended to cross-examine the witnesses about, urging that petitioner was entitled to adduce such evidence in order to allow the jurors to view these officers in the proper perspective, not the usual high esteem in which policemen are generally held by jurors. The credibility of the officers was essential to the success of the Government's case. Judge Sear granted the Government's motion and precluded the defense from eliciting such impeachment information before the jury.

The Government, to prove its allegation of perjury when petitioner denied knowledge of the mezzanine area rooms and their use for prostitution, called a wit-

ness named Donna Mathis to testify that she was one of the prostitutes who used the rooms and on one occasion petitioner allegedly solicited a patron of the Los Amantes Bar to engage in an act of prostitution with her and on another that the petitioner had taken a barmaid named Maria to one of the said rooms for apparent sexual purposes. At the time Donna Mathis was on the witness stand, defense counsel did not know that she was a drug addict at the times she said she saw petitioner at the Los Amantes Bar. Because the said witness had made the allegation about petitioner and the barmaid, defense counsel requested that the witness be held over after the completion of cross- and redirect-examination until the barmaid could be summoned and produced in Court to have the witness identify her as the person to whom the witness referred in her testimony. That afternoon, Donna

Mathis was again placed on the witness stand and the barmaid was asked to come into the Courtroom to be viewed by Donna Mathis. The witness identified the lady as the barmaid to whom she had previously referred. The witness was then excused by the Court. According to a supplemental brief filed after oral argument of this case before the Court of Appeals, shortly after her last testimony (Supp. Br. for U.S., pp. 8-9):

> late on the afternoon of December 4, 1979, the witness was given what previously to her had been an unspecified sum of money, $2,000.00, brought to the airport by Special Agents of the Federal Bureau of Investigation, and she told them that she was flying to Chicago. At no time was this witness protected by the United States Marshall's [sic] Service nor did the Government have any dominion or control over her after she was excused and brought to the airport.

The identity of Donna Mathis as a Government witness was withheld from the defense and Jencks Act material was not disclosed on the day preceding her testimo-

ny, as it had been with all other Government witnesses, ostensibly because the witness had been threatened by someone in a case arising out of the undercover police operation. Defense counsel had no knowledge of her existence until she assumed the witness stand. The defense advised the Court that it wanted to call Cynthia Campbell to testify that Donna Mathis was an addict in order to assail her credibility. (R. IV, Tr. 187-188) The Government complained that Donna Mathis had not been asked, hence had not denied, that she was an addict. The Court felt that the same basis existed for excluding such testimony as existed for the exclusion of the acts of the police officers to which petitioner previously adverted. Defense counsel responded (R. IV, Tr. 188-189):

> MR. McPHERSON: Your Honor, again, I followed all the proper protocol. I, number one, I did not know they

were going to call her. She was a secret witness.

THE COURT: No, but you didn't ask her [whether she was an addict].

MR. WINTERS (Prosecutor): You weren't supposed to know.

MR. McPHERSON: Correct, Your Honor.

The reason I didn't ask her is as follows: I did not know they were going to call her, had no background information, and had never heard her name until she hit the stand. I'm not going to ask this or any person for the basis for the question, "Are you a dope addict." That's improper and unethical on my part if I were to ask a question having no foundation for it.

* * * * * * *

I have since discovered that she is a dope addict, and I think the jury--I'm entitled to bring that out. We got into this problem because they wanted to play the game of not telling me who their secret witness was, did not give me the Jencks material until after she had--Jencks Act material until after she had testified. Therefore, it put me in a position that I could not bring out that she was a dope addict.

When the Court indicated that the defense's method of proof was improper, the defense asked if Donna Mathis could be re-

called and asked whether she was an addict. In the Court below, the Government claimed that the Court did not rule on the defense's request to recall the witness. However, the record clearly reflects that the Court held that it was "not going to permit that line of questioning." (R. IV, Tr. 191) Defense counsel then made a proffer regarding what Cynthia Campbell would say were she called and permitted to testify, as follows (R. IV, Tr. 192):

> Donna Mathis is a known dope addict, that Donna Mathis [sic, Cynthia Campbell] has worked with the DEA, that she, Cindy Campbell, has seen Donna Mathis take dope, that Donna Mathis used the proceeds from her prostitution activities to support the dope habit of hers and her pimp, that--* * * And that while Cindy Campbell was working for the DEA, she sold dope to this same Donna Mathis and saw Donna Mathis take it, and Cindy Campbell would testify that Donna Mathis has told her, Cindy Campbell, that she is a dope addict.

On appeal, but not during the colloquy concerning the proffer, the Government claimed that the proffer was inadequate to

justify collateral impeachment of Donna Mathis by Cynthia Campbell's testimony even if the fact the knowledge of her addiction came to the defense only after the Government had supplied her the means and abetted her departure from the jurisdiction immediately following her testimony, because the proffer did not state that Cynthia Campbell's testimony would relate to the time period during which Donna Mathis testified she observed petitioner's alleged activities at the Los Amantes Bar on the two relevant occasions. Such a representation was, to say the least, disingenuous. The proffer was made on December 6, 1979. Donna Mathis testified that the Los Amantes Bar was in operation between the end of November 1978 and May 1979. (R. III, Tr. 9) She testified that she was introduced to petitioner during the second week of December 1978. (R. III, Tr. 15) It is on that occasion she

alleged that defendant had attempted to promote a patron to engage with Donna Mathis or her friend in an act of prostitution at the Los Amantes Bar. (R. III, Tr. 15-16) Donna Mathis testified that it was some time between the latter part of February or early March 1979, just before she was arrested for prostitution, that she saw petitioner and Maria go up to one of the cubicles. (R. III, Tr. 21-24) For Donna Mathis to have been a "known addict," known to Cynthia Campbell in connection with her DEA undercover investigation as reflected in the colloquy surrounding the proffer, Donna Mathis would have had to have been engaged in narcotic usage during one or the other periods about which she testified against petitioner. Officer Wilben Tank testified he was involved in the undercover investigation between November and December 1978. (R. III, Tr. 53) Actually, as reflected in

the record of some of the companion cases, the undercover investigation began at the end of September or early October 1978. Therefore, the period of time during which Cynthia Campbell was involved in the narcotics phase of the investigation would have been contemporaneous with the period about which Donna Mathis testified. It was disclosed to the Court that Cynthia Campbell sold drugs to Donna Mathis with knowledge of the DEA during the undercover investigation. (R. IV, Tr. 190) The information was thus made known to the Court from which it could have been discerned that Cynthia Campbell's proposed testimony would relate to a time contemporaneous with the alleged events inculpating petitioner about which Donna Mathis testified.

The final confrontation issue arose in the following way. FBI Agent McGinty testified that petitioner, on the few occa-

sions he was observed to be at the Los Amantes Bar, always sat at a specific place at the bar. Agent McGinty testified, to refute petitioner's grand jury testimony that he had not seen the stairs leading to the mezzanine area, that the stairs could be seen and that people could be seen using them from the only place where petitioner was ever reported to have been seated in the bar. The defense had an architectural firm draft a scale drawing of the floor plan of the bar, marking the location of the bar and the relevant bar stool, and the architect was also asked to conduct an experiment to ascertain whether the stairs could be seen from the location of the bar stool and whether people could be seen using the stairs. The graphic and the architect's testimony refuted Agent McGinty's testimony that petitioner could have seen what Agent McGinty attributed to him. The de-

fense, to resolve the conflict between the evidence furnished by the architect and that to which the FBI Agent testified under oath, moved the Court to permit the jury to view the scene to ascertain for itself whether a person sitting where Agent McGinty testified that petitioner sat in the bar when he was there could see what Agent McGinty testified petitioner saw and could not have missed. The Court refused this means of impeachment of Agent McGinty--the only available means known to petitioner to impeach that witness.

C. THE AFFIRMANCE WITHOUT OPINION.

The Court below, after full oral argument and even the invitation of supplemental briefs after argument, wrote no opinion to justify its action affirming the petitioner's conviction. On petition for rehearing and suggestion for rehearing en banc, petitioner urged that Fifth Circuit Local Rule 21 had been improperly

applied in his case and that he had been denied due process by the disposition made in this case without an opinion justifying it. Petitioner asserted that the judgment of the Court of Appeals was contrary to the decisions of this Court in Alford v. United States, 282 U.S. 687 (1931); Bronston v. United States, 409 U.S. 352 (1973); and that it was contrary to a Panel opinion of the Fifth Circuit in United States v. Partin, 493 F.2d 750 (5 Cir. 1974), and that rejection of those authorities which apparently controlled the issues raised on the appeal of this case would have precedential value since no other adequate authorities of the Fifth Circuit existed to permit such a judgment. The Court below denied the petition for rehearing and suggestion for rehearing en banc without even providing a list of citations or a non-published opinion to show how or upon what basis the Court of

Appeals believed it could disregard two controlling decisions of this Court and a decision of another Panel of the Court without putting this matter en banc. The Fifth Circuit requires that the overruling of another Panel's opinion requires en banc consideration. See United States v. Colacurcio, --- F.2d ---, 1981 Term Fifth Circuit Slip Opinions 12529, 12532 (5 Cir. 10/22/81). Petitioner contended that with regard to the implicit overruling sub silencio of United States v. Partin, supra, the affirmance without opinion not only violated Local Rule 21 and the precedents cited in Petitioner's briefs and petition for rehearing but also violated the Internal Operating Procedures of the Fifth Circuit.

REASONS FOR ALLOWING THE WRIT

1. The Court below has failed to follow Bronston v. United States, 409 U.S. 352 (1973), and the decision below conflicts with decisions of other Circuit Courts of Appeals in which the Courts have held that Bronston

requires the Jury to be instructed in accordance with its doctrine.

The Grand Jury generally charged that a number of questions answered by petitioner before the Grand Jury were false and that such answers violated 18 U.S.C. §1623. Petitioner's grand jury testimony reflects that on several occasions before the Grand Jury petitioner distinguished that he meant by the "second floor" of his building a large vacant ballroom, the entrance to which was outside the bar premises and could not be seen from the place in the bar where he sat when there. His grand jury testimony recognizes that the prosecutors and grand jurors were not interested in the technical "second floor" of his building but rather with a mezzanine area which had been constructed by his tenant from a storage loft which pre-existed the tenancy of the then present tenant. That mezzanine area and

the stairs leading to it were concealed from view within the interior of the bar by a wall and door. Despite petitioner's definition of terminology, the Government persisted in its reference to the mezzanine area as the "second floor" or "upstairs". Petitioner's answers were indisputably correct with regard to the technical "second floor" of his building, as shown by the Act of Sale, the floor plan and all other testimony adduced on the trial of this case.

With regard to the mezzanine area, a jury question was presented in which the jury were called upon to resolve petitioner's credibility in denying ever having seen the area, having seen payments to the bar owner by prostitutes for access to and use of the mezzanine cubicles for prostitution, and visibility of the stairs from the position in the bar where petitioner was shown to have been seated on the sever-

al occasions he was there. In favor of petitioner's credibility, it was shown by the testimony of an architect that petitioner could not have seen the stairs to the mezzanine or people using the concealed stairway from the position of the bar stool on which he was shown to have sat in the barroom, contrary to the testimony of FBI Agent McGinty. The architect produced a scale drawing of the bar, the relevant door and doorway, stairs, bar and bar stool and he further testified about experiments conducted by him in the bar, as well as his own personal observations. As shown in the following Part of these Reasons for allowing review on a writ of certiorari, evidence was available to prove that the Government witness, Donna Mathis--the only witness other than the FBI Agent to produce evidence of petitioner's knowledge of the mezzanine cubicles--was a drug addict at the relevant

times and that her use of narcotics arguably impaired her abilities to perceive and accurately report what she testified about at petitioner's trial. It is unlikely that the jury did not rely upon the "second floor" and "upstairs" answers to questions regarding the mezzanine area and the testimony of Agent McGinty and Donna Mathis in convicting petitioner of making false declarations before the Grand Jury.

Where a general verdict is obtained upon jury instructions which are inaccurate or inadequate as to a theory of defense relevant to one of the alternative means of committing the offense alleged in the indictment, this Court has consistently held that the judgment must be reversed and a retrial granted upon proper instructions.

In this case, defense counsel requested the Trial Court to instruct the jury

that if the question asked was reasonably susceptible of two different interpretations the jury could not convict if the answer given was literally true. Instead, the Trial Court charged the jury that it should consider the testimony in the context of the sequence of questions asked and answers given and "the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness." The giving of such an instruction was affirmed without opinion by the Court below despite the timely request for proper instructions, objection to the instruction given and presentation to the Court of Appeals the issue that the instruction given violated the teaching of this Court in Bronston v. United States, 409 U.S. 352 (1973).

Under this Court's teaching in Bronston, it is not necessary that a question or answer be "mutually understood" before the defense recognized in that case is applicable. This Court clearly said (409 U.S. at 359):

> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answers] to be true." * * *

This Court explained that a situation in which a witness is subjected to cross-examination in the adversarial process is different from a situation involving criminally fraudulent or extortionate statements which may be literally true but are calculated to deceive or to create false impressions. 409 U.S. at 358 n. 4. This Court also recognized that "under our system of adversary questioning and

cross-examination the scope of disclosure is largely in the hands of counsel and the presiding officer." Ibid. This Court thus placed the burden upon counsel cross-examining a witness to precisely interrogate the witness, rather than upon the witness to answer at his peril of a jury determination that he intended to deceive or mislead when the answer actually given was literally true. The unanimous opinion of this Court concluded with the language (409 U.S. at 362):

> It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedies through the "questioner's acuity" and not by a federal perjury prosecution.

Whether petitioner may be considered as "a wily witness" who "succeed[ed] in derailing the questioner," Bronston, supra, at 360, or merely as a careful

witness who defined his terminology and consistently applied it even though he recognized also that the prosecutor was not using the same definition for the common terms, "second floor" and "upstairs," the Bronston defense should have been allowed to go to the jury upon proper instructions. The answers to the "second floor" and "upstairs" questions were literally true, although not responsive to the questions asked by the prosecutor who was using different meanings for those common terms.

Not only was the judgment below inconsistent with the opinion of this Court in Bronston, it was inconsistent and in conflict with the opinions of other Circuit Courts of Appeals which have been called upon to consider whether a jury instruction advising the jury of the principles of Bronston is required in a case where the witness' answer is literally

true but unresponsive, whether or not calculated to deceive or divert the examiner.

In United States v. Leonard, 524 F.2d 1076 (2 Cir. 1975), the appellant there presented the Bronston issue in the context of a motion for a judgment of acquittal. The defense urged that the testimony did not show that he personally had any Swiss bank accounts since the account was a numbered account and was not shown to have not belonged to a corporation owned by him or even an outsider. The Second Circuit said (524 F.2d at 1090):

> * * * We think that this contention is valid and that if Leonard's trial counsel had requested an instruction that the jury could not find this portion of the affidavit to be false, he would have been entitled to it. However, no such request was made and the defendant is thus forced to show also that there was no falsity in the denial of "any transactions or dealings of any nature with any foreign banks or other representatives." (Emphasis in quoted text.) * * *

In the instant case, petitioner's counsel did make the appropriate request. And

since this issue is not that petitioner is entitled to acquittal but to a fair trial upon adequate instructions concerning an available theory of defense which was presented sufficiently by the evidence and requested in the language used by this Court to state the applicable legal principles, petitioner is not saddled with the burden to show that all other answers were not also true. Numerous allegations were combined in a single count. The denial of a defense to a portion of the charges set forth in a single count requires a new trial.

In United States v. Alberti, 568 F.2d 617, 624-625 (2 Cir. 1977), citing Bronston, the Second Circuit held that "[a]t the new trial Alberti is entitled to limiting instructions to ensure that he is not convicted for his unresponsive but true statement that ziganette is '[n]ot necessarily' a high stakes card game." In

that case, there were multiple allegations of false testimony alleged in a single count of the indictment. Because the Bronston defense was denied when the trial court there refused to properly instruct the jury in accordance with this Court's holding, the judgment was reversed and the cause was remanded for a new trial upon proper instructions.

In United States v. Kehoe, 562 F.2d 65, 68-69 (1 Cir. 1977), the Court refused to reverse on the Bronston issue first raised at the appellate level because it did "not believe that the possibility that the defendant understood the questions to be limited to one particular incident raises an issue of literal truth" (562 F.2d at 68) and the objection was not properly preserved by a contemporaneous request for proper instructions to the jury (id. at 69 n. 3). The Court's decision implied that undisclosed limitations by

the witness upon the prosecutor's terminology would not suffice to raise the Bronston issue. As previously shown, the instant case is distinguishable because the petitioner defined his terms for the Grand Jury. As this Court noted in Bronston, supra, at 362, this should have alerted counsel to more precisely frame his question to avoid the conflict between terms used by the witness and examiner. The language of the Ninth Circuit in United States v. Cook, 497 F.2d 753, 772-773 (9 Cir. 1972) (ELY, J., dissenting), ordered published by the Ninth Circuit after Bronston was held to require reversal of the Panel decision and quoted with approval in United States v. Cash, 522 F.2d 1025, 1028 (9 Cir. 1975), is applicable herein:

> * * * there is abundant judicial authority recognizing that the crucial inquiry in a perjury case is whether the accused believed his testimony to be true in light of the meaning that he, not his interrogator, attributed to the

questions and answers. See, e.g., United States v. Wall, 371 F.2d 398, 400 (6 Cir. 1967); United States v. Winter, 348 F.2d 204, 210 (2 Cir.), cert. den., 382 U.S. 955 (1965); Seymour v. United States, 77 F.2d 577, 582 (8 Cir. 1935); United States v. Lattimore, 127 F.Supp. 405, 408 (D.D.C.), aff'd, 98 U.S.App.D.C. 77, 232 F.2d 334 (1955); ["cf. citations omitted]. (Emphasis in original.)

The imposition upon the jury of the obligation to resolve these issues in the light of the meanings of the words in their ordinary context, when petitioner had specifically defined to the Grand Jury the terminology used by him, and such imposed obligation to determine the "common understanding" of the parties, rather than to view petitioner's testimony "in light of the meaning that he, not his interrogator, attributed to the questions and answers, clearly violated the principles upon which a jury must, when requested, be instructed to apply in accordance with this Court's holding in Bronston.

The judgment without opinion of the Court below clearly produces a conflict with and outright defiance of the authority of this Court, enunciated in Bronston, as well as producing a conflict with the above cited decisions of other Circuits which have followed Bronston or indicated the application thereof in circumstances such as those presented by this case. This Court should therefore grant a writ of certiorari to review the judgment below and to conform the holding herein to the law as announced by this Court and followed in other Circuits as above shown.

2. The judgment below is inconsistent with and contrary to controlling opinions of this Court, with other opinions of the Fifth and other Circuit Courts of Appeals, and with the spirit, if not the written provisions, of the Federal Rules of Evidence.

The three areas of restriction of defensive evidence to which the confrontation issues presented by this case are:

(1) the denial of cross-examination of police officers regarding misconduct on their part, not reduced to charges or conviction, which would have shown the jury that these were not the general policemen who could reasonably be expected to be fair and honest; (2) the denial of a view by the jury to resolve the credibility of an FBI Agent whose testimony imputed knowledge to petitioner based upon the Agent's alleged observations of the physical layout of the bar about which petitioner's grand jury testimony was given; and (3) the denial of an opportunity to the defense to prove by extrinsic evidence that fact that one of the Government's principal witnesses was under the influence of narcotics at the times about which she testified, such information having been unknown to the defense at the time of the witness' testimony and her absence and unavailabil-

ity at the time such knowledge was obtained having been occasioned by the gift of Federal funds to the witness to leave town and their assistance to her in leaving the jurisdiction immediately after her testimony was given. These are all three issues of the petitioner's right to confront the witnesses against him. With regard to the latter varieties of confrontation issues, this Court has never dealt. With the former, it appears that the Court below has decided this case in a manner completely inconsistent with relevant opinions of this Court.

A. The Official and Unofficial Misconduct of Policemen.

In Alford v. United States, 282 U.S. 687, 693 (1930), this Court stated that inquiries "identifying the witness with his environment" are such that "cross-examination may always be directed." More recently, in Smith v.

Illinois, 390 U.S. 129, 131 (1968), this Court emphatically stated:

> [W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

In the instant case, Sergeant Kastner and Officer Tank were offered as Government witnesses against petitioner to prove, among other things, that petitioner knew the premises about which he had been examined before the Grand Jury were being let for prostitution in some cubicles which had been built by petitioner's tenant in a mezzanine area of the building which petitioner owned. The identification of these witnesses as police officers implied that they were good and righteous persons sworn

to uphold the law and doing so in the instant case.

As a matter of fact, one of the officers (Kastner) had entered into a partnership with a career criminal, Jimmy Chehardy, and had made that person a vice president of a corporation formed by Kastner, and they had together made applications for a bank loan in which they had made false representations to the bank in violation of 18 U.S.C. §1014. Patrolman Tank, while engaged in the undercover operation, became removed from the investigation of the prostitution and bribery phases of the investigation because of his misconduct in accepting favors from one or more prostitutes. There were about eleven enumerated similar areas of cross-examination of the officers into which defense counsel suggested he had a right to inquiry of the officers in response to the Government's motion in limine to pro-

hibit such cross-examination. Not all of the enumerated points referred to the two above named officers. The record reflects that at least one of the events about which defense counsel suggested he desired to cross-examine the officers related to the conduct of Patrolman Brink, who did not testify. The gist of petitioner's attack upon the officers' conduct was to prove they were "bad cops," not just acting as such in their undercover capacities as they testified, thereby tending to prove to the jury that these men's true environment was not that to which the jurors would naturally associate police officers but was, instead, the dens of criminals and brothels of the French Quarter from which they, had they lived up to their image as police officers, would have been required to abstain and arrest others similarly engaged.

The Trial Court regarded such evidence as being controlled by Rule 608(b), F.R.Evid., in which it is provided that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, * * * may not be proved by extrinsic evidence." The method sought to be used by petitioner, however, was not by extrinsic proof but by cross-examination. Rule 608(b) specifically permits inquiry on cross-examination into specific conduct of the witness which would affect his credibility. This distinction is also supported in the jurisprudence. E.g., United States v. Varelli, 407 F.2d 735, 751 (7 Cir. 1969); Kitchen v. United States, 95 U.S.App.D.C. 277, 221 F.2d 832, 834 (1955), cert. den., 357 U.S. 928 (1958); Hug v. United States, 329 F.2d 475, 483 (6 Cir.), cert. den., 379

U.S. 818 (1964); Pullman Co. v. Hall, 55 F.2d 139, 141 (4 Cir. 1932).

Rule 608 relates to the proof of the character of a witness. When a person testifies he is a police officer, a certain image is conjured up that such a person is good, truthful and righteous. The cross-examination sought to be employed by petitioner was actually to elicit proof to contradict the ordinary impression jurors would have of witnesses occupying the status as police officers and to show the jurors who and what these officers really were. Proof by contradiction is a proper means for proving a witness' actual character once his good character is raised, as here, by the implication flowing from their identity as police officers. The means sought here was cross-examination of the officers to contradict the ordinary image enjoyed by them as police officers. Rule 608(b) specifically provides that the

witness may be cross-examined upon specific acts. Petitioner should have been afforded reasonable latitude upon cross-examination to demonstrate the officers' specific acts which would have shown they were not, as implicitly represented, honest, law-abiding policemen.

This Court, having never considered the question whether the status of a policeman infers good character which may be refuted by cross-examination on the basis of specific acts of misconduct, and, if this Court does not feel that Alford and Smith v. Illinois adequately control the issue raised by this case, this Court should at least grant a writ of certiorari to declare the applicability of Rule 608(b), F.R.Evid., and the Sixth Amendment right of confrontation under circumstances such as here presented. We believe the disregard by the Court below, especially in the situation where a judgment was en-

tered without explanation how it could do so, of the controlling decisions of this Court should impel this Honorable Court to grant a writ of certiorari to require the Fifth Circuit to conform to the law as mandated by this Court in the Alford and Smith cases, supra.

B. The Jury View of the Scene.

Agent McGinty testified that from where he said petitioner was seated in the Los Amantes Bar petitioner could see the stairs leading to the mezzanine area and that he could see people using those stairs. An architect retained by the defense refuted that testimony by scale drawings made by his firm and by his testimony regarding experiments conducted by him in the bar. Because of his position as an FBI Agent, Mr. McGinty enjoyed a credibility advantage over the architect. As a matter of fact, however, he was not entitled to credibility and that could have

been shown if the Court had permitted the jury to view the scene.

The granting or refusal of a view of a scene by a jury is generally discretionary with the Trial Court. 23 C.J.S. Criminal Law §986; C.I.T. Corp. v. United States, 150 F.2d 85 (9 Cir. 1945); Massenberg v. United States, 19 F.2d 62 (4 Cir. 1927); Schonfeld v. United States, 277 F.2d 934 (2 Cir.), cert. den., 258 U.S. 623 (1921); Reid v. United States, 276 Fed. 253 (6 Cir. 1921); Govt. of Virgin Islands v. Taylor, 375 F.2d 771 (3 Cir. 1967); Hughes v. United States, 377 F.2d 515 (9 Cir. 1967); United States v. Lopez, 475 F.2d 537 (7 Cir.), cert. den., 414 U.S. 839 (1973); United States v. Bryant, 563 F.2d 1227, 1230 (5 Cir. 1977). Appellate courts do not reverse except upon a showing of an abuse of discretion by the Trial Court. Ibid.

Petitioner respectfully submits that an abuse of discretion occurred in this case when the Trial Court refused to permit a jury viewing of the Los Amantes Bar to resolve the conflict between and credibility of the testimony of the FBI Agent and the architect. It was crucial to this case for the jury to decide whether the petitioner knew certain things imputed to him by the testimony of Agent McGinty relative to his alleged observations from a point near where petitioner was shown to have sat in the bar. Agent McGinty testified that he could see through the door leading to the concealed stairs and that he could see people moving in a way indicative that they were going up stairs. McGinty, however, was in a different place and had a slightly different viewpoint than petitioner would have had from his own vantage point. The architect testified the stairs could not be seen

from petitioner's vantage point and that to even see through the crack of the door in order to see anyone's movements toward the stairs a person sitting in petitioner's position would have had to lean back at a precarious angle. There was no testimony which would indicate that petitioner engaged in such gymnastics.

At the conclusion of the architect's testimony, defense counsel moved the Court to permit the jury to visit the bar and see for itself whether or not defendant could have seen what Agent McGinty testified he could. The Court refused to permit the jury to visit the bar for that purpose. The resolution of the credibility issue with regard to petitioner's grand jury testimony and the trial testimony of Agent McGinty depended upon the jury having accurate information about what could be seen from where petitioner was seated in the bar. Denial of an opportuni-

ty for the jury to see the scene and determine for itself the credibility of the witnesses deprived petitioner of an essential means of confronting the testimony of the official witness who imputed false knowledge to him.

Where a jury view would aid the jury to ascertain the truth of the issue of a defendant's knowledge and no other means would have aided it as much, we submit the denial of a motion to permit the jury to view the scene was a clear abuse of discretion.

Most of the cases we have read have not shown in what manner or by what process of reasoning the lower courts have arrived at their decisions to permit or not to permit a jury view of a scene important to the case. In Louis Hung v. United States, 111 F.2d 325 (9 Cir. 1940), the Court held it was not an abuse of discretion to refuse to permit a view by the ju-

ry where a witness testified that he had seen acts constituting the offense which occurred in a corridor and the witness and accused testified differently about the width of the hallway. From the diagrams offered by the defense, the Court concluded the witness could have observed the transaction regardless of the width of the hallway. No similar reasoning was ventured by the Trial Court in the instant case. As a matter of fact, the diagrams offered by the defense would have refuted the Agent's testimony, but for his testimony that he could see through the crack between the door and door jamb the activity upon which petitioner's knowledge is imputed. That crack would not have been demonstrable by the architectural layouts of the bar introduced through the architect. The only means of verifying the accuracy of either witness' testimony would have been to permit the jury to view the scene.

There was no use of discretion by the Trial Court in this case. There was but an arbitrary determination that such a procedure would not be permitted. The issue of the ability of petitioner to see what Agent McGinty claimed could have been seen was thus left to the unaided determination of credibility by the jury on the basis of the status of the witnesses. We doubt that any case could present more necessitous circumstances for requiring a jury view of a relevant scene. If the Trial Court's discretion is not totally unfettered in such matters, then there was a clear abuse of discretion in this case which affected petitioner's very ability to defend himself.

This Court has never before decided the issue presented by this point. In fact, there is very little jurisprudence at all on the issue of the standards for the exercise by a trial judge of the dis-

cretion to grant or refuse a jury view of the scene of disputed testimony. Because the Government has, by the refusal of a jury view, been allowed to profit from false testimony and has obtained an unjust conviction of this petitioner, and because the enunciation of guidelines and standards for the exercise of discretion in such matters is of great importance to the administration of the authority to grant or deny such extraordinary procedures, this Court should grant a writ of certiorari in this case and enunciate the proper standards.

C. The Impairment of Addict's Perceptions.

3 Weinstein's Evidence ¶607[04], p. 607-46 (1981), classifies drug addiction as "a condition which by its very nature implies that [the addict's] capacity to observe, remember and narrate is impaired." Congress has even recognized that the

addiction of a witness is a proper basis for cross-examining such a person as a witness. See Civil Commitment and Rehabilitation of Narcotic Addicts Act (NARA), 28 U.S.C. §2094, which prohibits the fact of commitment under the NARA Act but allows in a criminal proceeding the adducement on cross-examination of the fact the witness is a narcotic addict "as bearing on his credibility as a witness." 3 Weinstein, op. cit., supra, at p. 607-44, points out that "[d]efects of this nature reflect on mental capacity for truth-telling rather than on moral inducements for truth-telling, and consequently Rule 608 does not apply." The prohibition of adducing extrinsic proof of specific acts of conduct, contained in Rule 608(b), F.R.Evid., was the basis upon which the Trial Court refused to allow petitioner to offer the testimony of Cynthia Campbell to prove the likelihood of the im-

pediment of perceptions, recall and ability to narrate of the witness, Donna Mathis, at the times about which she testified on the trial of this cause. Judge Weinstein's observation that such evidence reflects upon capacity rather than character, we submit, is well taken.

In the area of other forms of mental illness, the Fifth Circuit reversed the conviction of a defendant represented by undersigned counsel when the Court refused to permit the defense to elicit evidence the witness suffered auditory and visual hallucinations at a point near in time to the events about which he testified. United States v. Partin, 493 F.2d 750, 762 (5 Cir. 1974). What was there said by the Fifth Circuit in reversing that judgment is, mutatis mutandis, applicable in the instant case:

> It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury

to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.

In the instant case, the witness was unavailable when defense counsel learned that she had been an addict at the time she was supposed to have seen petitioner (1) solicit her and another prostitute to commit prostitution in the cubicles above the bar, and (2) take the barmaid to the said cubicles, ostensibly to have intercourse. Knowing of the witness' absence at the time defense counsel learned this important fact, counsel sought to adduce extrinsic proof of her condition without having previously asked and had the witness deny her addiction at the relevant time. When the objection was made the witness had not been permitted to deny or explain, defense counsel sought to have the witness recalled for that purpose. It was not because of the unavailability of the

witness but the Trial Court's erroneous interpretation of Rule 608(b), F.R.Evid., that the evidence was excluded. This was error which completely emasculated petitioner's constitutional right of confrontation.

Since addiction is such a pervasive problem in our society, especially among the segment of the population most likely to be witnesses in a criminal case, this Court should grant a writ of certiorari and review this issue of great importance to the administration of criminal justice under the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the Constitution.

3. The judgment below, rendered without support of a written opinion, violates due process, Rule 47, F.R.A.P., and Fifth Circuit Local Rule 21, and the rendering of an affirmance without opinion in this case so far departs from the standards of appellate review that this Court should exercise its power of supervision and require the Court below to conform to the mandates of the law relative to appellate review.

The Fifth Amendment to the Constitution assures that a person's liberty shall not be taken without due process of law. Every person convicted of a crime in Federal Court has a right of appeal. The issues and the state of the law may also allow him to get full consideration without requiring the Court to provide a written justification for the judgment reached. Such is the purported scope of Fifth Circuit Local Rule 21. But as the arguments made in support of the first and second reasons for granting the requested writ of certiorari demonstrate, if the petitioner was not entitled to prevail upon appeal the requirements of Fifth Circuit Rule 21 mandated the preparation of written reasons for the judgment rendered. The Rules of the Courts of Appeal have the force of law. Bradley v. Pace, 87 U.S.App.D.C. 11, 183 F.2d 806 (1950). The

Court below, therefore, could not have disregarded the limitations imposed upon it by its own Rules and rendered a judgment without opinion in this case which does not fit within the narrow confines of Local Rule 21.

Local Rule 21 presupposes that where precedent is not adequate to put to rest the issues raised by an appeal to that Court, an opinion will be written to justify the judgment rendered. Where the Court does not feel that full oral argument is not required, provision is made in Fifth Circuit Local Rule 18 for placing the case on the Summary Docket. This case, however, passed all of the screening procedures and it was deemed by a Panel of the Fifth Circuit that this case was entitled to oral argument. Not only was full oral argument allowed, but the Court even allowed supplemental briefs after oral argument. Petitioner does not suggest that the Court

below has not gone through the motions of providing him full and fair appellate review. Petitioner suggests, however, that the review provided, in the absence of an opinion justifying the judgment rendered, was not full and fair because the failure to write an opinion in this case cannot be justified under Local Rule 21 because there was substantial error in the proceedings which resulted in the judgment of conviction and an opinion distinguishing this case from prior precedent of this Court and of the Fifth Circuit would have had precedential value if the judgment is correct.

There seems to be no apparent reason why Alford v. United States, supra, and Smith v. Illinois, supra, should not have entitled petitioner to inquire into specific acts of misconduct on cross-examination of the witnesses against him. If there is cause to avoid applying a deci-

sion of this Court which is apparently applicable and not distinguished on the basis of other existing authority, such cause requires an opinion because the case obviously has precedential value.

The same may be said with regard to the refusal of the Court below to deal with the issue raised by petitioner under the authority of Bronston v. United States, supra, that petitioner was entitled to have presented upon instructions to the jury the defense recognized in the Bronston case.

The judgment of the Court below is in apparent conflict with United States v. Partin, supra. If this case is distinguishable from Partin on the basis that this case involved drug impairment of a witness' faculties while Partin involved non-chemically induced dementia, such a view of the law would have been

unique and would have had precedential value.

Mr. Gomez is presently confined to prison on charges that were untrue. He was not accorded a fair trial because the Trial Court prevented him from presenting to the jury relevant evidence which would have seriously affected the credibility of the officials who testified against him and the narcotic addict, Donna Mathis. He wonders how it could be just for the Trial Court to have permitted the emasculation of his defense by totally gutting his cross-examination of the witnesses against him. He looked to the Court below for answers to that question. Rather than answers in a this case which not only deserved but, under the terms of Local Rule 21, required them, petitioner is left to hold on to and justify for the duration of his imprisonment a piece of paper which says, "AFFIRMED. See Local Rule 21."

Local Rule 21 does not say he may be denied an answer to the legal issues presented by his case when there is no adequate precedent to justify his conviction, especially when precedent of this Court appears to require reversal. Rule 21 requires not only the absence of merit but the absence of precedential value of an opinion before an opinion may be denied. When counsel is asked what authority exists to justify the judgment of the Court below, he can only state that he does not believe such authority to exist. Then when asked how the Court of Appeals could have affirmed the judgment of the Court below without providing an opinion to explain the legal reasoning behind the judgment, counsel can only answer that the Court below exercised "power" and violated the law, thus relegating petitioner to only the discretionary remedy of review upon a writ of certiorari. If there is

any justice left in the system, petitioner will get legal answers in proceedings conforming to the law in this Court and will not be met with the "power" to avoid the issues presented by his case with the single word, "DENIED," made in response to this final request for legal justification of his condemnation as a criminal after a lifelong history of being an honest, law-abiding person.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES A. MC PHERSON
Attorney for Petitioner
McPHERSON & ZAINEY
Attorneys at Law
419 Carondelet Street
New Orleans, LA 70130
Telephone: [504] 581-1973

CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Loyola Avenue, New Orleans, Louisiana, this ___ day of November, 1981.

All parties required to be served have been served.

JAMES A. MC PHERSON
Attorney at Law

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-3049

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS H. GOMEZ, SR.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(APRIL 27, 1981)

BEFORE COLEMAN, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5 Cir. 1970).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-3049

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS H. GOMEZ, SR.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion APRIL 27, 1981, 5 Cir., 1981, --- F.2d ----)

BEFORE COLEMAN, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(1) The Petition for Rehearing is DENIED and no member of this Panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

* * * * * * * * *

ENTERED FOR THE COURT:

s/SAM D. JOHNSON
UNITED STATES CIRCUIT JUDGE